

24 Hours

08 November 2006

Alexenia Dimitrova
Journalist
24 Hours Daily
70 Graf Ignatiev Str.
Sofia, Bulgaria 1142

Central Intelligence Agency
Mr. Scott Koch
FOIA and Privacy Coordinator
Washington, DC 20505
USA

*fee waiver
appeal*

Re: Freedom of Information Act Request
REFERENCE : F-2007-00102

Sirs:

I hereby appeal the erroneous CIA initial determination that I must assume responsibility for \$150 of search and review fees for each of my pending Freedom of Information Act requests (please see the attached correspondence), and I ask that this initial determination be reexamined in light of the additional information provided below.

1) I am a legitimate accredited award winning journalist who has been extensively published in print news and books throughout the world and disseminated in the United States, and under CIA regulations and the FOIA statute my requests qualify under the news media fee category.

According to my curriculum vitae (CV) narrative:

Alexenia Dimitrova is a Bulgarian journalist and author with more than 21 years of experience. She works in the second largest daily in Bulgaria [24 Hours (24 chasa)]. Her favorite topics are secret

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archives of the Cold War era, shadow affairs and corruption, money laundering, suspicious ownership and property, and secret societies. Recently she has profiled finding lost people all over the world and reuniting them. For her series of publications about missing persons which started in July 2002, and still continues, she received Chernorizets Hrabar (the most prestigious award for investigative journalism in Bulgaria) in November 2004. She had been nominated for the same award in 2003.

Dimitrova has published more than 4,000 stories in 40 media in Bulgaria, the USA, Russia, and Great Britain. Her book The Iron Fist - Inside the Bulgarian and American Secret Archives was published in March 2005 in London and in English by Artnik Publishing. The same book (under the title The War of the Spies) was published in Bulgaria in October 2005.

Dimitrova graduated from Sofia University in 1986 and has specializations on journalism in the World Press Institute, St. Paul, MN, and the University of Missouri, Columbia, (USA), Reuters (Great Britain), European Center for Journalism (Netherlands), and Danish School of Journalism in Aarhus. Mrs. Dimitrova is licensed lecturer in journalistic investigations in Bulgaria within the framework of SouthEast European Network for Professionalism in the Media. She is also was local trainer for the BBC on investigative journalism during a 3 year project implementing the Self regulation and the Code of Ethics of Bulgarian Media. She is one of the 12 members of the Press Complaint Commission in Bulgaria.

She has been invited to speak at seminars and other events of investigative journalism in Bulgaria, Denmark, Croatia, Netherlands, Austria, Moldavia, Armenia, Slovenia, Germany, Bosnia, Albania, Azerbaijan, and Turkey.

She is a member of the union of Bulgarian journalists, the Investigative Journalists Association; International Federation of Journalists (IFJ); and is a founding member of South East European Media Organization (SEEMO)

Parenthetically, I have reason to believe that a copy of my recent book: The Iron Fist - Inside the Bulgarian and American Secret Archives (2005), is within the holdings of your agency library, and thus is felt to be a useful addition to the holdings therein.

While the CIA may have felt it was important to narrow the news media category for certain agency policy reasons, clearly my work

demonstrates that granting me news media categorization would not defeat those policy objectives.

My published work to date represents precisely the type of news media reporting anticipated in the CIA regulatory definition. My work is of a variety that has had a substantial impact on the American public's understanding of the operations or activities of the United States Government with regard to interaction with Bulgaria and other eastern bloc countries during the Cold War.

2) The CIA limitation of the news media fee category to U.S. news media is contrary to the law.

According to the CIA FOIA regulations on the CIA's website, the CIA amended its regulations to ensure foreign news media would be entitled to preferential fee status. Thus, the CIA Interim Rule published in the federal register: ([Federal Register: June 16, 1997 (Volume 62, Number 115)] [Rules and Regulations] [Page 32479-32500] states:

(b) The section entitled "Definitions" is amended to include additional terms common to the processing of FOIA requests and to expand the definition of news media to include foreign media having a substantial impact on the American public's understanding of the operations or activities of the United States Government; see Southam News v. Immigration and Naturalization Service, 674 F. Supp. 881, 882 (D.D.C. 1987) and 32 CFR 1900.02;

The definition itself does not limit news media status to U.S. news media. It says:

(3) Representative of the news media means a request from an individual actively gathering news for an entity that is organized and operated to publish and broadcast news to the American public and pursuant to their news dissemination function and not their commercial interests; the term news means information which concerns current events, would be of current interest to the general public, would enhance the public understanding of the operations or activities of the U.S. Government, and is in fact disseminated to a significant element of the public at minimal cost; freelance journalists are included in this definition if they can demonstrate a solid basis for expecting publication through such an organization, even though not actually employed by it; a publication contract or prior publication record is relevant to such status; (32 CFR Sec.

1900.02)

The current CIA practice is contrary to the text, the legislative intent, the CIA regulations, the Justice Department interpretation, and the spirit of the FOIA statute, all of which recognize that a legitimate foreign journalist serves the same function in informing the public of the activities of government as a legitimate domestic journalist. Furthermore, there is no doubt that news reporting in other countries also is conveyed to the American public by primary transmission (over the internet) and by secondary transmission (as news reporting is observed and followed up by other members of the press). The CIA interpretation might even be interpreted to suggest that a member of the Canadian or British or French or German press would not be recognized under the "news media" fee category.

The CIA initial determination of my fee category patronizingly suggests that important information on the activities of Eastern European Soviet bloc nations during the Cold War would be of no interest or importance to Americans. I suggest the polar opposite – that nothing is of greater importance to an American audience of the Cold War era activities within these territories. It is a matter of straightforward U.S. government policy to encourage the opening of foreign secret archives to learn more about repressive policies during the Soviet era, so that this information can be made available through publication to citizens of all countries.

The CIA regulation, if scrutinized in federal court, would at minimum be questioned by the court as to its congruency with the FOIA statute.

The FOIA statute, the OMB fee guidelines and the Justice Department guidance are clear that foreign news media requesters are not treated differently than domestic news media requesters provided that the requesting organization "gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work and distributes that work to an audience."

The following discussion is derived from the FOIA Guide published by the U.S. Department of Justice.

Under the FOIA statute, the second level of fees limits charges to document duplication costs only, "when records are not sought for commercial use and the request is made by an educational or noncommercial scientific institution, whose purpose is scholarly or

scientific research; or a representative of the news media." 5 U.S.C. § 552(a)(4)(A)(ii)(II).

FOIA requesters falling into one or more of these three subcategories of requesters under the 1986 FOIA amendments enjoy a complete "exemption" from the assessment of search and review fees. See 132 Cong. Rec. S14,298 (daily ed. Sept. 30, 1986) (statement of Sen. Leahy) (referring to requesters within the second level of fees as receiving the benefits of "the most favorable fee provision").

Their requests, like those made by any FOIA requester, still must "reasonably describe" the records sought in order to not impose upon an agency "'an unreasonably burdensome search.'" AFGE v. United States Dep't of Commerce, 907 F.2d 203, 209 (D.C. Cir. 1990) (quoting Goland v. CIA, 607 F.2d 339, 353 (D.C. Cir. 1978)).

In addition to the words of the statute, the Office of Management and Budget (OMB) Fee Guidelines are also binding authority, according to the U.S. Department of Justice and longstanding CIA practice.

The definition of a "representative of the news media" refers to any person actively gathering information of current interest to the public for an organization that is organized and operated to publish or broadcast news to the general public. See OMB Fee Guidelines, 52 Fed. Reg. at 10,018.

The Court of Appeals for the District of Columbia Circuit has elaborated upon this definition, holding that "a representative of the news media is, in essence, a person or entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience." Nat'l Sec. Archive v. Department of Defense, 880 F.2d 1381, 1387 (DC Cir. 1989); see also Elec. Privacy Info. Ctr. v. DOD, 241 F. Supp. 2d 5, 14 (D.D.C. 2003) (explaining that the fact that an entity distributes its publication "via Internet to subscribers' email addresses does not change the [news media] analysis").

In reaching its decision, the D.C. Circuit relied in large part on the legislative history of the 1986 FOIA amendments, See Nat'l Sec. Archive, 880 F.2d at 1385-87, not finding the term "representative of the news media . . . self-evident [in] what [it] covers." See *id.* at 1385; see also 132 Cong. Rec. H9464 (daily ed. Oct. 8, 1986) (statement of Rep. English) (referring to "written explanatory

materials that would have been included in a committee report" and that acknowledge that "no definition of 'news media' has been included in the [1986 FOIA amendments]").

In more recent years, however, perhaps partly due to the passage of the Electronic FOIA amendments, Pub. L. No. 104-231, 110 Stat. 3048, in conjunction with the ushering in of the "Information Age," D.C. Technical Assistance Org. v. HUD, 85 F. Supp. 2d 46, 49 (D.D.C. 2000) (commenting on changes wrought by "Information Age"), there has been renewed interest in the question of what constitutes a "representative of the news media" both in the FOIA context Elec. Privacy Info. Ctr., 241 F. Supp. 2d at 14 n.7 (explaining that while plaintiff qualified as a news media entity, "the Court is not convinced that a website is, by itself, sufficient to qualify a FOIA requester as a 'representative of the news media,'" and reasoning that virtually all organizations and many individuals in the metropolitan area have Web sites, "but certainly all are not entitled to news media status for fee determinations").

The D.C. Circuit did make clear at the time of its decision in National Security Archive, however, that the term "representative of the news media" excludes "private libraries" or "private repositories" of government records, or middlemen such as "information vendors [or] data brokers," who request records for use by others. This fee category, though, includes freelance journalists, when they can demonstrate a solid basis for expecting the information disclosed to be published by a news organization.

It is well settled that a request from a representative of the news media that supports a news-dissemination function "shall not be considered to be a request that is for a commercial use." A request from a representative of the news media that does not support its news-dissemination function, however, should not be accorded the favored fee treatment of this subcategory.

Further, a request that is made to support an endeavor that merely makes the information received available to the public (or others) is not sufficient to qualify it for placement in this fee category.

Under the FOIA, once a requester has gathered information of interest to the public it must, in some manner, "use its editorial skills to turn the raw materials into a distinct work" in order to qualify as a representative of the news media. National Security Archive v. Dept of Defense, 880 F.2d 1381, 1387 (D.C. Cir. 1989); cf. Elec. Privacy Info. Ctr. v. Dep't of Defense, 241 F. Supp. 2d 5, 12 (D. DC 2002) ("Labels and titles alone . . . do not govern" the qualification for

media status; rather, "the organization's substantive activities control."). In the first case to construe this subcategory of requesters, the requester's status was not in dispute but rather where the news organization performed its media function. There the court held that even a foreign news service may qualify as a representative of the news media. Southam News v. INS, 674 F. Supp. 881, 892 (D.D.C. 1987).

For these reasons, I believe that my public records requests, narrowly tailored to obtain records to which I will apply my experienced editorial skills to create a distinct work which I will disseminate to the public through the news organization for which I work, and which have both an international audience and a U.S. audience due to the subject matter, fall easily within the definition of news media requests for purposes of the FOIA statute as well as the narrower definition in the CIA regulations. To deny my fee categorization in the news media fee category would not only create a barrier and hurdle to my requests to counter the spirit and intent of the FOIA statute, but would defeat the very intent and purpose of the CIA regulatory policy regarding news media fee categorization described above. For this reason, I ask that my requests be properly categorized as from a "representative of the news media" and that no search and review fees be appended to my requests which would moot the need for the arbitrary \$150 per request fee.

Respectfully,

Alexenia Dimitrova



cc: Meredith Fuch, General Counsel
The National Security Archive

19 October 2006

Ms. Alexenia Dimitrova
24 Hours Daily
70 Graf Ignatiev Str.
Sofia, BULGARIA 1142

Reference: F-2007-00102

Dear Ms. Dimitrova:

The office of the Information and Privacy Coordinator has received your 20 September, 2006, Freedom of Information Act (FOIA) request for:

"All CIA documents about Todor Zhivkov's overthrow in November 1989 and all the events related to it."

We have assigned your request the reference number above. Please use this number when corresponding with us so that we can identify it easily.

Please note that our research indicates this current request is a duplication of a previous one submitted by you in November 2005 (F-2006-00143), which was closed due to your failure to commit to fees.

We uphold our previous decision to you in F-2006-00143, under the Agency FOIA regulations outline under Part 1900 of Title 32 of the Code of Federal Regulations (CFR) to deny your request for a fee waiver as the information you seek is not likely to contribute significantly to public understanding of the operations and activities of the United States Government.

You may appeal this decision, in my care, within 45 days from the date of this letter. Should you choose to appeal the denial of your request for a fee waiver, you are encouraged to provide an explanation supporting your appeal. Agency regulations also specify that if the Agency has started to process a request, the Agency may only accept an appeal of a fee waiver denial if the requester agrees to be responsible for the cost in the event of an adverse administrative or judicial decision.

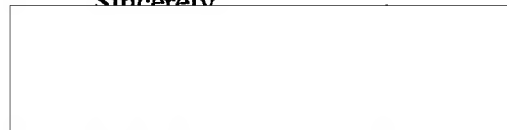
Please note that we also uphold our decision to place you into the "commercial" fee category due to your status as a reporter for a Bulgarian newspaper, not an entity that is organized and operated to publish and broadcast news to the American public; a prerequisite factor in determining fee status in this category. This means that you will be responsible for the full direct costs for searching, reviewing and duplicating responsive records.

Search fees for each item in a request are usually about US \$150. The additional review fees, however, will depend upon the number of documents located as a result of the search, and the copying fees will depend upon the number of releasable documents, if any exist.

In accordance with Section (a) of the schedule (enclosed), search fees are assessable even if no records are found or, if found, we determine that they are not releaseable. This means you will be charged even if our search results are negative or if it is determined that no information is releasable under the FOIA.

Before we can begin processing your request **we must receive your commitment to pay fees incurred under the conditions stated herein.** Meanwhile, we will hold your request in abeyance for 60 days from the date of this letter awaiting your reply.

Sincerely,



Scott Koch

Information and Privacy Coordinator

Enclosure

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